

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-20373-CR-LENARD/KLEIN

UNITED STATES OF AMERICA

v.

NARSEAL BATISTE, et al.

Defendants.

FILED BY: _____
06 JUN 29 PM 1:51
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIA

**GOVERNMENT'S MOTION TO DISQUALIFY THE
FEDERAL PUBLIC DEFENDER'S OFFICE FROM REPRESENTING
DEFENDANT NARSEAL BATISTE BASED ON CONFLICT OF INTEREST**

The United States, by and through the undersigned Assistant United States Attorneys, files this motion to disqualify the Federal Public Defender's office based on an actual conflict of interest arising from the representation of defendant Narseal Batiste, and in support states as follows.

INTRODUCTION

The defendants in this cause are charged by way of indictment with conspiracy to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B, conspiracy to provide material support for the commission of an act of terrorism, in violation of 18 U.S.C. § 2339A, conspiracy to destroy or damage a building by means of an explosive, in violation of 18 U.S.C. § 844(n), and seditious conspiracy to levy war against the United States, in violation of 18 U.S.C. § 2384. These charges stem from the defendants' plans to use explosives to destroy the Sears Tower building in Chicago, Illinois, and their support for a purported plan of al Qaeda, a foreign terrorist organization, to use explosives to destroy the offices of the Federal Bureau of Investigation

in Miami, Los Angeles, New York City, Chicago and Washington, D.C.

At the initial appearance, the Federal Public Defender's Office was appointed to represent Batiste. The government objected on the ground that the Federal Public Defender's office had an actual conflict that jeopardized Batiste's Sixth Amendment right to conflict-free representation. Specifically, the Federal Public Defender's Office had been recently appointed to represent a government witness, Sultan Khan Bey, a/k/a Charles Stewart (Stewart), who has pending charges of being a felon in possession. Stewart was listed as a subject on a Title III application in this case, was intercepted in audio and video recordings meeting with Batiste during the conspiracy, has admitted to federal law enforcement that he had some knowledge of the terrorist plot that has been charged in this case, and has indicated an interest in cooperating against Batiste. As will be demonstrated below, the continued representation of Batiste by the Federal Public Defender's office adversely affects the interests of Batiste, Stewart, the government, and the public.

THE FACTS

In late October, 2005, Batiste discussed with others his desire to form an army and fight jihad from within the United States in order to overthrow the government. Batiste also attempted to recruit an individual whom he had learned traveled to the Middle East to assist him in locating foreign Islamic extremists to fund his mission. Unbeknownst to Batiste, the person he recruited alerted the FBI. The FBI in turn introduced to Batiste a cooperating witness ("CW") of Arabic decent who eventually told Batiste specifically that he was from al Qaeda. In the first meeting between the CW and Batiste on December 16, 2005, the CW told Batiste that he had just arrived in Miami from overseas and was here to evaluate Batiste's organization for funding and assistance. The CW asked Batiste what support he needed and Batiste wrote out a list of materials, which included uniforms,

boots, machine guns, radios and vehicles. Batiste said that he needed the materials and equipment on the list to build an "Islamic Army" to wage jihad.

From that date forward, in a series of meetings and conversations with the CW, Batiste outlined his plans to wage war against the government of the United States, which included his plan to destroy the Sears Tower in Chicago, to achieve the overthrow of the government, and requested materials and financial backing for Batiste's "mission." In order to forge an alliance with al Qaeda to accomplish his mission, Batiste and the other defendants swore an oath of "bayat" or loyalty to al Qaeda.¹ After doing so, the defendants agreed to assist in a fictitious al Qaeda plot to blow up FBI buildings in five cities, including the FBI building in North Miami Beach, by taking photographs and videotapes of the FBI building and other federal buildings in downtown Miami. Although Batiste and defendants agreed to assist in the al Qaeda plot, Batiste expressed concern that it would interfere with their mission to wage war against the government of the United States which included his plan to blow up the Sears Tower in Chicago. The CW assured defendants that the al Qaeda plan would be coordinated with their plan.

The meetings between the CW and defendants took place in various locations, including an abandoned store/warehouse in Liberty City, which defendants referred to as "the embassy," where defendants regularly met in order to discuss their mission in private. They also met at a warehouse purportedly provided to the defendants by al Qaeda as a location where they could meet and conduct training exercises (the "undercover warehouse").

¹ In administering the al Qaeda oath of "bayat," the CW stated that he was representing Usama bin Laden. Each of the defendants repeated the oath, and in turn, stood and stated their names. The oath included a pledge to be an Islamic soldier, to be a loyalist to the path of holy war, and to act at the direction of al Qaeda.

The Chicago Connection

In a meeting on April 1, 2006, the CW asked Batiste about his associates in Chicago. Batiste replied that his main man in Chicago was the "Sultan." He stated that the "Sultan" was aware that there was a plan, but was not aware of the details because Batiste did not want to talk about the plan over the telephone. Batiste and the CW discussed having the "Sultan" travel to Miami. The next day, Batiste telephonically called Charles Stewart in Chicago, and referring to him as "Sultan," invited him to Miami and said that he "didn't want to make any moves" without talking to him. This telephone call was intercepted pursuant to a Title III wiretap order. Stewart was listed in that order as a subject of the investigation.

After this conversation, Batiste coordinated travel to Miami from Chicago for Stewart and his wife. Once in Miami on April 11, 2006, a meeting in the undercover warehouse between Stewart, Batiste, Rotschild Augustine and Stanley Phanor was monitored pursuant to a Title III wiretap order. In that meeting, Stewart and Batiste discussed the recruitment and orientation of new members. Stewart stated that he wanted to nationalize 10,000 people into the Moorish nation. He also said he wanted to take some of the responsibility away from Batiste. Stewart also discussed efforts underway to make Moorish national security cards. Stewart and Batiste discussed bringing about a revolution to help the people. In this regard, Stewart stated that when they fight, they fight on the righteous side, not on the stupid side. He continued that they must stick together and not trust anyone but each other and those that they train. He also discussed that they needed green and black uniforms and that they must be trained mentally, physically, and spiritually and that such training all starts tomorrow. Stewart said that they were "vanguards" and "angels" here to rid the Earth of filth; that they were a nation and would do what nations do; and that as long as they stood on Islam,

they were impregnable.

In several telephone conversations to Chicago after this meeting, Stewart was intercepted explaining that he was working with and training “brothers” in Miami. Based on an intercepted telephone call between Batiste and his wife, on April 19, 2006, it appeared that there arose a dispute between Batiste and Stewart. This dispute apparently caused a rift in Batiste’s organization. In early May, 2006, Stewart allegedly shot a gun at a person after an argument inside “the embassy.”

Charles Stewart’s arrest

Stewart was arrested by local authorities and released on bond. On May 5, 2005, Stewart was arrested by the Bureau of Alcohol, Tobacco and Firearms (ATF) on a federal charge of being a felon in possession of a firearm. After his arrest, Stewart made statements to an ATF agent that he had knowledge of individuals that were “plotting” against the United States and he noted that these people were starting to get serious. Stewart added that “they” were taking pictures of buildings such as “this one”-- as he pointed to the Federal Detention Center, which he was about to enter. Stewart said that he spoke to Joel Bratton Bey, the grand sheik of the Moorish National Republic, about this situation, and he provided a telephone number for Joel Bratton Bey. Attached is a redacted copy of the ATF report containing Stewart’s statements. The Federal Public Defender’s Office was appointed to represent Stewart in that matter.

MEMORANDUM OF LAW

A district court is given broad latitude to evaluate an alleged conflict of interest, whether actual or potential, and to determine whether, in the court’s discretion, disqualification of the defendant’s chosen counsel is warranted. *See Wheat v. United States*, 486 U.S. 153, 162-63 (1988);

United States v. McCutcheon, 86 F.3d 187, 89-90 (11th Cir. 1996).² In this case the Federal Public Defender's Office is faced with an **actual**, not potential conflict of interest.³ The Federal Public Defender Office's client, Stewart, was involved in the events underlying this case, and he appears to be, at a minimum, a material witness to criminal activity conducted by defendant Batiste.⁴ In this situation, the Eleventh Circuit has held that an attorney has an actual conflict of interest "**when he has previously represented a person who will be called as a witness against a current client**" in a criminal trial. (*Emphasis added*) *United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994) (citing *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991)). In *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir.), the former Fifth Circuit explained that:

An actual conflict of interest occurs when a defense attorney places himself in a situation "inherently conducive to divided loyalties." (citations omitted). If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to the other client . . .

United States v. Oberoi, 331 F. 3d 44, 51-52 (2nd Cir. 2003); *United States v. Cruz*, 982 F. Supp. 946,

² Notably, a district court's decision to disqualify a defendant's chosen counsel due to an actual or potential conflict of interest is reviewed for abuse of discretion, viewing the situation as it existed at the time of the decision. *See, e.g., Wheat*, 486 U.S. at 164; *McCutcheon*, 86 F.3d at 189; *Ross*, 33 F.3d at 1523.

³ Even a potential conflict is sufficient to disqualify counsel. *Wheat*, 486 U.S. at 164.

⁴ The conflict affecting one lawyer in a firm is imputed to the other lawyers in that office. *Ross*, 33 F. 3d at 1523; *Reynolds v. Chapman*, 253 F.3d 1337, 1343 (11th Cir. 2001); *see also* Florida Bar Rules of Professional Conduct 4-1.10 (Imputed Disqualification). Courts have been loathe to accept assurances, no matter how well-intentioned, that a wall will be erected in such situations between the lawyer in possession of those confidences and his partners. *Phillips*, 952 F. Supp. at 484.

949 (S.D.N.Y. 1997); *Phillips*, 952 F. Supp. at 484. In deciding whether an actual or potential conflict warrants disqualification of counsel, the court must determine whether the subject matter of the first representation is substantially related to that of the second. *Ross*, 33 F.3d at 1523. They also must evaluate the interests of the defendant, the government, the witness, and the public in view of the circumstances of a particular case. *United States v. O'Malley*, 786 F.2d 786, 790 (7th Cir. 1986); *United States v. James*, 708 F.2d 40, 44 (2nd Cir. 1983). Allowing a conflicted attorney to continue representing a defendant creates a risk that the attorney could be deterred from conducting a full and vigorous evidentiary presentation or examination of a witness in order to protect the relationship, individual, or entity that gives rise to the conflict of interest. *See, e.g., Ross*, 33 F.3d at 1523; *Register*, 182 F.3d at 832. In such a situation, absent disqualification, the results of a criminal proceeding could be rendered suspect and laid open to collateral attack on the basis of an ineffective assistance of counsel claim. *See McCutcheon*, 86 F.3d at 189; *Ross*, 33 F.3d at 1524; *see also Wheat*, 486 U.S. at 161-63.

Attorneys operating under a conflict of interest present the district court with a myriad of concerns. First, the accused is entitled under the Sixth Amendment to conflict-free counsel. *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). Second, the government has an interest in preventing the reversal of a defendant's conviction on Sixth Amendment grounds. *See, e.g., Martincz*, 630 F.2d at 362-63 (reversal of conviction when attorney for defendant cross-examined former client codefendant called as government witness). Third, federal courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160; *Ross*, 33 F.3d at 1523. Fourth, trial courts

have an affirmative duty to ensure that the accused receives a fair trial. *Wheat*, 486 U.S. at 161.

The Federal Public Defender's Office will be in the position of having to vigorously cross-examine their own client in their defense of another client. Further, the Federal Public Defender's Office's knowledge of attorney/client confidences with Stewart "could cause [them], consciously or unconsciously, to hesitate to examine [Stewart] on topics or in ways that would be most advantageous to" Batiste. *Phillips*, 952 F. Supp. at 484. This, in turn, becomes an issue on collateral review, and threatens the integrity of any judgment reached in this case. *Cruz*, 982 F. Supp. at 949. It also creates an appearance of impropriety. *Id.*

The Federal Public Defender's Office has a real conflict that could be currently affecting this case. Stewart's statement reflects that he has knowledge of the objects of the conspiracy in this case and that he would be interested in cooperating. Given that he was a listed subject in the intercept, was recorded attending meetings, and has already admitted his knowledge of the conspiracy, it would be logical to fully explore cooperating with the government in this matter. The potential for Stewart being a witness against Batiste is very real even if he chooses to not cooperate because he can be granted immunity and compelled to testify if necessary. The central question becomes whether the Federal Public Defender is properly situated to address this issue with Stewart given that they represent Batiste and the cooperation of Stewart would be very detrimental to Batiste's interests.

CONCLUSION

In light of the above, it is quite clear that the Federal Public Defender's Office labors under an intractable conflict with regard to this case. This case has only recently been indicted, and the defendants have not yet been arraigned or had their pre-trial detention hearings, and this case is not set for trial. Defendant Batiste will not be prejudiced by the disqualification of the Federal Public

Defender's Office at this early stage in the proceedings. Therefore, the proper result is that the Federal Public Defender's Office be disqualified from further representation of defendant Batiste.

Respectfully submitted,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: 

Jacqueline M. Arango
Assistant United States Attorney
Florida Bar Number 664162
99 Northeast 4th Street
Miami, Florida 33132-2111
(305) 961-9292
(305) 536-7213 (fax)
E-Mail: jacqueline.arango@usdoj.gov

By: 

Richard E. Getchell
Assistant United States Attorney
Florida Bar Number 817643
99 Northeast 4th Street
Miami, Florida 33132-2111
(305) 961-9281
(305) 536-4675 (fax)
E-mail: richard.getchell@usdoj.gov

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this

29 day of June, 2006, to:

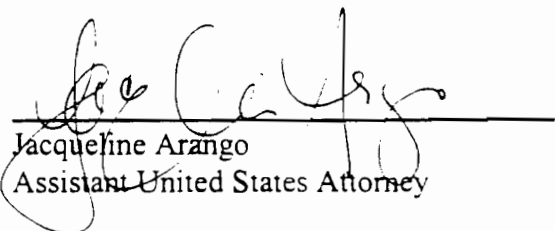
Albert Levin, Esq.
261 N.E. 1st Street, Floor 6
Miami, Florida 33132-2515
Fax: (305) 372-0052
email: alevinlaw@aol.com
Attorney for Patrick Abraham

Nathan Clark, Esq.
17639 S Dixie Hwy
Miami, Florida 33157-5447
Fax: (305) 255-7040
email: nclark@coralreeflaw.com
Attorney for Rotschild Augustine

John Wiley, Esq.
Assistant Federal Public Defender
Federal Public Defender's Office
150 West Flagler Street, Suite 1500
Miami, Florida 33130
Fax: (305) 536-4559
Attorney for Narseal Batiste

Richard Houlihan, Esq.
300 Aragon Avenue, Ste. 310
Coral Gables, Florida 33134-5044
Fax: (305) 443-6236
email: rkhoulina@aol.com
Attorney for Naudimar Herrera

Gregory A. Prebish, Esq.
28 W. Flagler Street, 11th Floor
Miami, Florida 33130
Fax: (305) 377-8335
email: gaplaw@bellsouth.net
Attorney for Burson Augustin



Jacqueline Arango
Assistant United States Attorney

Report of Investigation

Subject of investigation:
Sultan Khan Bey A.K.A. Stewart

Investigation Number:

Report Number:

SUMMARY OF EVENT:

Arrest Statements of KHANBEY During Processing - On May 5, 2006 Sultan KHANBEY stated to ATF Special Agents that he had information regarding a group of individuals plotting against the United States.

RELATIVE:

1. On May 5, 2006 at approximately 1:00 PM ATF Special Agents [REDACTED] were processing Sultan KHANBEY outside of the Federal Detention Center located at 33 NW Fourth Street, Miami, Florida 33101. The processing included completing various Federal Bureau of Prisons Remand Forms and Documents.
2. Sultan KHANBEY was read his Miranda Rights via [REDACTED] by ATF Special Agent [REDACTED]. Mr. KHANBEY signed a waiver of those rights and agreed to speak to Special Agents [REDACTED] after confirming he understood those rights (See ROI # 3).
3. Prior to his (KHANBEY's) entry into the Federal Detention Center Special Agent [REDACTED] asked Sultan KHANBEY if he was aware of any criminal activity in Miami, Florida or Chicago, Illinois. Sultan KHANBEY stated the following:

Mr. KHANBEY stated that he had knowledge of individuals that were "plotting" against the United States and noted that these people were starting to get serious. He added that "they" were taking pictures of buildings such as this one (pointing to the Federal Detention Center). KHANBEY told S.A. [REDACTED] that he spoke to Joel Bratton Bey about this situation. Bey is the Grand Sheikh of the Moorish National Republic ([REDACTED]). S.A. [REDACTED] attempted to obtain specific names and details from KHANBEY regarding his claim, but KHANBEY stated that he would not be able to provide any other information to agents unless he received an agreement from the U.S. Attorney to drop his current charges.

4. ATF Special Agent [REDACTED] stated to KHANBEY that he could not provide this agreement to him (KHANBEY). Mr. KHANBEY no longer answered any questions by Special Agent [REDACTED] regarding this topic. A short time later, KHANBEY, was transported into the Federal Detention Center.

Prepared by: [REDACTED]	Title: [REDACTED]	Signature: [REDACTED]	Date: 6/27/06
Authorized by: [REDACTED]	Title: [REDACTED]	Signature: [REDACTED]	Date: 6/27/06
Second level reviewer (optional): [REDACTED]	Title: [REDACTED]	Signature: [REDACTED]	Date: [REDACTED]